1986

Alma E. Peck v. Eimco Process Equipment Co., Second Injury Fund and Industrial Commission of Utah : Brief of Petitioner

Utah Supreme Court

Roger D. Sandack; Giauque and Williams; Attorney for Appellant.
Robert Finch, Erie Boorman, Ralph L. Finlayson; Attorneys for Respondent.

IN THE SUPREME COURT

1986 20914 OF THE STATE OF UTAH

ALMA E. PECK,	)	
Petitioner,	)	
vs.	)	Case No. 20914
EIMCO PROCESS EQUIPMENT CO., SECOND INJURY FUND and INDUSTRIAL COMMISSION OF UTAH,	)	
Respondents.	)	

BRIEF OF PETITIONER

Writ of Review from
Industrial Commission of Utah

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ALMA E. PECK,	)	
Petitioner,	)	
vs.	)	Case No. 20914
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BRIEF OF PETITIONER

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Is petitioner entitled to the benefits of Utan Code Ann. § 35-1-67 (1953, as amended), for permanent total disability benefits based upon his physical impairments arising out of the industrial injury, pre-existing conditions and other extrinsic conditions, including age, education, employment skills and physical impairments?

2. Did the Industrial Commission of Utah act arbitrarily or capriciously in reversing an order of the Administrative Law Judge awarding permanent total disability benefits?

3. Did the Industrial Commission of Utah commit error of law by (1) misapplying the standard for review of an Administrative Law Judge's order; (2) misapplying the law related to employers' burden of proof in odd-lot cases; or (3)

failing to consider substantial uncontroverted evidence of permanent total disability?

STATEMENT OF FACTS

Alma E. Peck is a 65-year-old industrial maintenance mechanic who sustained several recent industrial injuries involving his left knee (September 12, 1980); right foot (November 16, 1982); and low back (December 19, 1982). The back and knee problems necessitated surgery and left claimant with permanent disability. The applicant sought industrial benefits for temporary total, permanent partial and permanent total disability under the provisions of Title 35 of the Code. All benefits were denied by his employer, Eimco Process Equipment Co.

Mr. Peck filed for a hearing and presented evidence of accidental injuries occurring during the course of his employment. That evidence is uncontroverted and apparently not at issue on appeal. Subsequent to the initial hearing and submission to a medical panel, the Administrative Law Judge, adopting the findings of the medical panel, determined the following impairments pre-existed the September 12, 1980 accident:

1. Right ankle - 7%;
2. Hearing loss - 5%;
3. Cervical - 5%;
4. Left wrist - 2%;
5. Left knee - 2%;
6. Right arm - 1%.

A combined whole-body rating of 21%, together with an additional 3% for cervical degeneration, subsequent to September 1980 but before the December 1982 accident, was rendered to the applicant by the medical panel for a whole-body combined rating of 24%.

The medical panel then rated the September 1980 injury to the right knee at 2% and the December 1982 low back injury at 10%. Thus, 12% impairment was due to the industrial accidents, combining with the pre-existing 24% to 33% whole-body disability (R.179-188).

As of the date of the hearing, applicant was 64 years of age. He attended high school in Carey, Idaho, having graduated in 1937 and essentially had no other formal education. Since that date, his work was considered primarily labor with emphasis in welding, blacksmithing and maintenance, all of which required significant movement and lifting ability.

Subsequent to the surgery necessitated by the December 1982 industrial injury, and following his convalescence, the applicant returned to light-duty work with Eimco in June 1983. His light-duty restrictions were not released (R.166). Mr. Peck testified that he was not able to perform his normal work activities but for the charity of individuals working with him (R.166). This situation continued through a reorganization of the department and until a time when the applicant felt that his presence in the department was a liability to himself and others with whom he worked (R.168). Thus, after approximately nine months, Mr. Peck terminated employment. It was never his

intent to voluntarily retire since he had no other income and little retirement (R.168). The only amount he receives from Eimco for full retirement benefits is $53.30 per month (R.174), out of which $34.00 per month is deducted for his spouse's health insurance (R.169). This net sum, $19.30 per month, is hardly an incentive to voluntarily terminate employment which provided an opportunity to earn in excess of $1,800.00 per month (R.15).

Mr. Peck then applied for consideration of permanent total disability benefits (R.126). A separate evidentiary hearing was held, after which Mr. Peck was referred to Mr. Richard Olson, a rehabilitation counselor with the State Rehabilitation Office, who determined that applicant was not a good candidate for rehabilitation because of his age, physical impairment, continued deterioration in his health, and the general overall appearance of a man who has worked an extended time and was then, and is now, suffering from physical impairments and general deterioration associated with age (R.217). The Administrative Law Judge then ordered payments of permanent total disability based upon applicant's age, education and medical infirmities. It is upon that order that the Second Injury Fund and the employer appealed to the Industrial Commission. The Commission reversed, holding that applicant had voluntarily retired and was thus not entitled to the permanent total benefits awarded. This appeal followed.

SUMMARY OF ARGUMENT

1. Applicant is permanently totally disabled and should receive benefits pursuant to Utah Code Ann. § 35-1-67.

2. The Industrial Commission's denial of benefits is contrary to law.

ARGUMENT

I. APPLICANT IS PERMANENTLY TOTALLY DISABLED AND SHOULD RECEIVE BENEFITS PURSUANT TO UTAH CODE ANN. § 35-1-67.

The Findings of Fact, Conclusion of Law and Order set forth Mr. Peck's prima facie claim to permanent total disability benefits under Utah Code Ann. § 35-1-67. A separate hearing was held for the specific purpose of determining Mr. Peck's status. Thereafter, Mr. Peck was referred to the Rehabilitation Office in accordance with the mandate of Section 35-1-67. The Findings of Fact and Conclusions of Law, while relucantly given, were consistent with this Court's holding in Marshall v. Industrial Commission of Utah, 681 P.2d 208 (Utah 1984). The order is also consistent with numerous other holdings of this Court. Brundage v. IML Freight, Inc., 622 P.2d 790 (Utah 1981); Northwest Carriers, Inc. v. Industrial Commission of Utah, 639 P.2d 138 (Utah 1981).

The Industrial Commission reversed the Administrative Law Judge's order agreeing with defendants' arguments that since the applicant returned to work after his surgery and before his termination from employment, then, a fortiori, Mr. Peck was able to return to his normal and usual occupation, and

therefore was forever barred from claiming the benefits of Section 35-1-67. Such a narrow interpretation of that section would mean that once an individual attempts to return to work, light duty or otherwise, he has become forever barred from subsequently seeking permanent total disability benefits. That interpretation is wholly inconsistent with prior holdings of this Court. See Meacham v. Industrial Commission of Utah, 682 P.2d 783 (Utah 1984); Buxton v. Industrial Commission of Utah, 587 P.2d 121 (Utah 1978).

The Commission's rationale is also inconsistent with the odd-lot doctrine recognized in virtually every jurisdiction and specifically adopted in the recent case of Marshall v. Industrial Commission of Utah, supra. That doctrine holds that total disability may be found in workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well known branch of the labor market. The essence of the test is the probable dependability with which a claimant can sell his services in a competitive labor market undistorted by such factors as business booms, sympathy from employer or fellow workers, or superhuman efforts despite the claimant's crippling handicaps 2 Larson, Workmen's Compensation Law, § 57.51 at 10-164.49; see also, § 57.64(b) at 10-164.154 through 10-164.164.

Elements of the odd-lot doctrine include irregularity or unpredictability of the quality, quantity and overall performance of the employee's work record. These elements were

clearly shown to have existed in favor of a finding that Alma Peck was not able to continue in his normal occupation.

Many states, including our own, only require that the claimant demonstrate a prima facie case for total disability. Thereafter, the burden shifts to the employer to prove the availability of steady work regularly available to him. Marshall v. Industrial Commission of Utah, supra. Among the classifications of cases defined as "odd-lot" are a number of cases involving a voluntary quitting with no element of misconduct. If a claimant quits his job for reasons having nothing to do with an industrial injury, obviously he should not be entitled to claim permanent total benefits. However, if a claimant quits because he cannot continue to perform his former duties primarily because of pain or other functional incapacity left by reason of pre-existing conditions and his industrial injury, the quitting then forms no impediment to a finding of compensable permanent total disability. While the number of reasons for quitting are limited, the central issue is the same: Was the disability in any significant degree a factor in the decision to resign or retire? If the motive is merely to get a better job or to obtain more job security, change residence or family status, then the answer is no. There are few cases directly on point where the reasons for quitting were because of continuous pain, reduced quantity or quality of work performance, and fear of creating danger to others. Most, however, have applied the procedure adopted by

this Court in Marshall v. Industrial Commission of Utah, supra. See 2 Larson, Workmen's Compensation Law, § 57.64(b), supra. If the applicant is able to demonstrate a prima facie entitlement, then the burden should shift to the employer. In this matter, the employer was given every opportunity to defend and to present evidence of steady employment available to Mr. Peck, but failed to do so.

Defendants may argue that their burden was met by merely demonstrating the applicant returned to work in approximately June 1983, and continued to work until his retirement in April 1984. This contention, whether adopted by the Industrial Commission, the Adminitrative Law Judge or the defendants, is simply inconsistent with uncontradicted and believable substantial evidence to the contrary. Applicant testified that he needed to work beyond his 65th birthday in order to qualify for meaningful benefits (R.169), not for the rather meager sum of $53.00 gross per month. Yet, because of his physical inability, pain, charity from fellow workers and belief that he could constitute a danger to others, he was forced to quit. Had he been able to continue his work, he would have built upon a meaningful retirement benefit and would have been able to save for the future. Since this industrial injury contributed in major part to his termination, Mr. Peck should rightfully be entitled to the continued benefits of the Worker's Compensation Act.

The employer cannot meet its burden through Mr. Peck's testimony. The monetary facts and vocational findings all

support the Adminstrative Law Judge's Findings of Fact, Conclusions of Law and Order awarding permanent total disability benefits.

II. THE INDUSTRIAL COMMISSION'S DENIAL OF BENEFITS IS CONTRARY TO LAW.

The rule of law in this and other odd-lot cases is clearly and umambiguously set forth in Marshall v. Industrial Commission of Utah, supra. For that reason, the Administrative Law Judge felt compelled to award benefits to Mr. Peck in spite of his personal belief to the contrary. Clearly, Mr. Peck had demonstrated a prima facie case; clearly the employer failed to meet its shifted burden of proof.

Defendants may assert that the Administrative Law Judge "found that the applicant did in fact return to work and did perform the previous duties required in his occupation" (R.228). Such a finding, if upheld, is wholly unsupported by any evidence in the record. In fact, all substantial evidence is to the contrary. The Industrial Commission cannot simply choose to disbelieve the applicant's uncontradicted testimony simply to enforce their personal beliefs as to what the law is or ought to be.

Defendants' argument that once an employee returns to his former duties he is forever barred from obtaining benefits under Section 35-1-67 is without merit and inconsistent with the policy behind worker's compensation statutes. See Meacham v. Industrial Commission of Utah, supra. Neither do these arguments consider applicant's "progressive" disease for which

the medical panel gave a 2.5% whole-body rating between September 1980 and December 1982, and another 2.5% whole-body rating since that date to the date of the panel evaluation. This same progression was noted by the rehabilitation officer:

> It is my feeling that Mr. Peck is not a good candidate for rehabilitation because of his age, physical impairment, continued deterioration in his health, including the arthritis in his foot, and the general overall appearance of a man who has worked an extended time and is now suffering from the physical impairments and the general deterioration associated with age (R.217).

The Commission's order granting defendants' motion for review was based entirely upon the Administrative Law Judge's interpretation of law as set forth in Marshall v. Industrial Commission of Utah, supra. The Commission adopted the defendants' argument that because Mr. Peck returned to work following his light release by his doctors, Marshall did not apply. The Commission chose to reverse (rather than remand) the order and thereby deprive applicant of permanent total disability benefits. At a minimum, the Commission failed in its duty by not reviewing the substantive evidence presented by the applicant concerning his reasons for termination and their relationship to the industrial injury; failed to properly consider or apply the holding of this Court in Marshall v. Industrial Commission of Utah; and failed to afford applicant procedural and substantive due process of law in choosing simply to disbelieve his uncontroverted testimony.

CONCLUSION

For the reasons specifically set forth by this Court in Marshall v. Industrial Commission of Utah, the applicant, Alma E. Peck, should be entitled to receive permanent total disability benefits. The Industrial Commission's summary reversal of the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order awarding such benefits is wholly inconsistent with law, ignores substantial uncontroverted evidence of permanent total disability, and is arbitrary and capricious. It is respectfully suggested that this Court vacate the Industrial Commission's Order and remand this matter to enter the original Order granting permanent total benefits.

RESPECTFULLY SUBMITTED this 18th day of February, 1986.

GIAUQUE & WILLIAMS
500 Kearns Building
Salt Lake City, UT 84101
Telephone: 801/533-8383

By _____
Roger D. Sandack

Attorney for Applicant

2702L

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that four true and correct copies of the Brief of Petitioner were placed in the United States mail, postage prepaid, to the following persons on this _____ day of February, 1986:

Ralph L. Finlayson
Office of the Attorney General
State Capitol Building
Salt Lake City, UT 84114
Attorney for Industrial Commission
of Utah

Erie Boorman, Administrator
Second Injury Fund
160 East 300 South
Salt Lake City, UT 84111

Robert Finch
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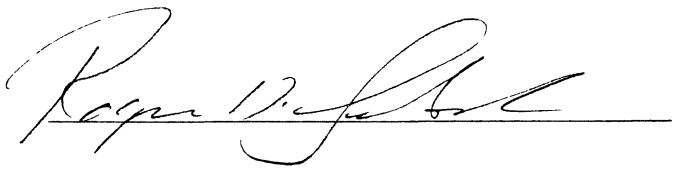
Attorney for Eimco Process
Equipment Co.



A D D E N D U M

IN THE SUPREME COURT

OF THE STATE OF UTAH

ALMA E. PECK, Petitioner, vs. EIMCO PROCESS EQUIPMENT CO., SECOND INJURY FUND and INDUSTRIAL COMMISSION OF UTAH, Respondents.	)	DOCKETING STATEMENT Case No. 20914

Petitioner respectfully submits the following Docketing Statement pursuant to Rule 9 of the Utah Rules of Appellate Procedure:

I. JURISDICTION

Authority to review this matter is conferred upon this Court by Utah Code Ann. § 35-1-83 (1953, as amended).

II. NATURE OF PROCEEDING

This is an appeal from a Final Order of the Industrial Commission of Utah, Workmen's Compensation Division.

III. DATE OF ORDER

Petitioner seeks review of the Industrial Commission's Order Granting Motion for Review, dated August 30, 1985, by the filing of a Petition for Writ of Review, dated September 27, 1985.

IV. STATEMENT OF FACTS

Petitioner is a 65-year-old industrial mechanic employed by respondent Eimco Process Equipment Co. Petitioner suffered a back injury as a result of an industrial accident occurring during the course of his employment on December 19, 1982. As a result of this accident, subsequent back surgery necessitated by the accident, several prior injuries received during the course of his employment with Emico Process Equipment Co., and other pre-existing medical impairments, the Medical Panel found permanent partial disability as follows:

Right ankle - 7%;
Hearing loss - 5%
Cervical - 10%;
Left wrist - 2%;
Left knee - 2%;
Right arm - 1%;
Right knee - 2%;
Low back - 10%.

The Industrial Commission found a combined 12% permanent partial impairment due to the industrial accident of December 1982, together with a combined 33% whole-body disability due to all conditions using the Hair computations.

Petitioner requested a finding of permanent total disability because of his age, education and medical impairments. After hearing, petitioner was referred to the Utah State Department of Rehabilitation Services pursuant to Utah Code Ann. § 35-1-67, which found applicant was not a good candidate for rehabilitation. The Administrative Law Judge then entered Findings of Fact, Conclusions of Law and an Order

awarding petitioner permanent total disability benefits pursuant to Utah Code Ann. § 35-1-67.

Respondent Second Injury Fund filed a motion to review the Administrative Law Judge's decision principally upon the ground that petitioner worked following his surgery and voluntarily retired from his employment. The Industrial Commission granted this motion to review and entered its own findings without ever seeing the petitioner or reviewing his testimony that his work consisted of charity by fellow workers and that he was forced to retire in spite of his previous desire to continue working.

V. ISSUES

1. Is the petitioner entitled to the benefits of Utah Code Ann. § 35-1-67 for permanent total disability benefits based upon his age, education, employment skills and physical impairments?

2. Did the Industrial Commission act arbitrarily by failing to affirm the order of the Administrative Law Judge awarding such permanent total disability benefits or by failing to remand the same for further evidentiary findings if it felt such were necessary?

VI. STATUTORY AND CASE LAW

Petitioner relies upon Utah Code Ann. § 35-1-67, and Noland Marshall v. Industrial Commission of Utah, 681 P.2d 208 (Utah 1984).

VII. ATTACHMENTS

Attached hereto and made a part hereof are the following necessary attachments:

1. The Industrial Commission's Order Granting Motion to Review, dated August 30, 1985;

2. Findings of Fact, Conclusions of Law and Order entered by the Administrative Law Judge, dated February 28, 1985; and

3. Petitioner's Petition for Writ of Review, filed September 27, 1985.

RESPECTFULLY SUBMITTED this 16th day of October, 1985.

GIAUQUE & WILLIAMS
500 Kearns Building
Salt Lake City, UT 84101
Telephone: 801/533-8383

By _____
Roger D. Sandack

Attorneys for Petitioner

2532L

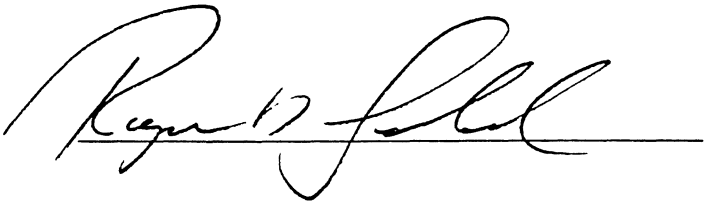
CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that true and correct copies foregoing DOCKETING STATEMENT were placed in the United States mail, postage prepaid, to the following persons on this 15 day of October, 1985:

Office of the Attorney General
State Capitol Building
Salt Lake City, UT 84114

Robert Finch, Esq.
559 East South Temple
Salt Lake City, UT 84102

Erie Boorman, Administrator
Second Injury Fund
160 East 300 South
Salt Lake City, UT 84111



INDUSTRIAL COMMISSION OF UTAH

CASE No.83000275

ALMA E. PECK,	*	
Applicant,	*	GRANTING
vs.	*	MOTION FOR REVIEW
EIMCO PROCESS EQUIPMENT CO., and SECOND INJURY FUND	*	
Defendant.	*	

On February 28, 1985, an Administrative Law Judge of the Commission issued an Order, which was supplemented by a later Order issued on March 26, 1985. The two Orders taken together provided that the defendant company pay permanent total disability benefits to the Applicant based on a percentage of the whole person impairment which resulted due to two industrial accidents the Applicant had while employed with the defendant company. The Second Injury Fund was directed to pay the Applicant permanent total disability benefits based on the percentage of the whole person impairment that existed prior to the industrial injuries. Upon review of the file and the Administrative Law Judge's Orders, the Commission is of the opinion that the case does not warrant an award of permanent total disability benefits. A review of the file follows.

The Applicant was employed with the defendant company as an industrial maintenance mechanic. The industrial injuries at issue, in this particular filing, involved a left knee injury which occurred on September 12, 1980, which necessitated surgery which was performed on October 17, 1980. There was next a right foot injury occurring on November 16, 1982, and finally, a back injury on December 19, 1982. Following the back injury, the Applicant returned to work, but was later hospitalized on March 17, 1983 for back surgery. The Applicant was discharged on March 24, 1983, and an Application for Hearing was filed by the Applicant and his attorney on March 30, 1983. The Application stated that the Applicant sought permanent partial impairment benefits as the result of the September 12, 1980 knee injury, and the November 16, 1982 foot injury, as well as temporary total disability and permanent partial impairment benefits for the December 29, 1982 back injury. In answer to the Application, the defendant company stated that it sought reimbursement from the Applicant for temporary total disability benefits and medicals paid for the September 12, 1980 knee injury, as the defendant alleged the defendant was not liable for these benefits it had paid as there was no industrial accident. The defendants further contended, that no further benefits were due the Applicant for the November 16, 1982 foot injury, and no benefits at all due the Applicant for the December 29, 1983 back injury, as no accident occurred on that date either.

On June 27, 1983, the Applicant returned to work. On October 17, 1983 a hearing was held which resulted in an appointment of a medical panel on October 19, 1983. On February 3, 1984, the Commission received the medical panel report which is quoted extensively in the Administrative Law Judge's February 28, 1985 Order. On April 27, 1984, the Applicant turned sixty-five years old, and on April 28, 1984, the Applicant retired from his position with the defendant. The Applicant's attorney filed a generalized objection to the medical panel report, which included a request for an award of permanent total disability benefits for the Applicant on June 7, 1984. The Administrative Law Judge wrote the Applicant and his attorney, and informed them that the request for permanent total disability benefits was denied. A second hearing was held on September 25, 1984. The medical panel submitted a clarification of the medical panel report on October 5, 1984. On November 8, 1984, the Commission received a report from a Rehabilitation Counselor of the Utah State Office of Education, which concluded that the Applicant was not a good candidate for rehabilitation due to the Applicant's age, physical impairment, and general health deterioration.

On February 28, 1985, the Administrative Law Judge issued his Findings of Fact, Conclusions of Law and Order. Adopting the medical panel findings as his own, he awarded permanent total disability benefits citing, Nolan Marshall v. Emery Mining, case No. 19153, filed April 5, 1984, as precedent for the award. The Administrative Law Judge stated in his Conclusions of Law, that the Marshall case "mandated" the award of benefits, and that he made the award "reluctantly". This reluctance is understandable considering the Administrative Law Judge's further statements, that the Applicant did not leave work on April 28, 1984 because of old or new injuries and that the Applicant "just plain retired". The defendant filed objections to the Administrative Law Judge's Findings of Fact, Conclusions of Law on March 18,1985, stating that the Marshall case could be factually distinguished from the instant case, that the percentages the Administrative Law Judge used did not correctly account for Hair adjustments, and that once again, there was no compensable knee injury on September 12, 1980. In response to this, the Administrative Law Judge issued a supplementary Order on March 26, 1985, stating specifically that compensable accidents occurred on all three dates in issue. A Motion for Review was filed by the Second Injury Fund, stating that Applicant returned to work after his most recent industrial accident, which disqualified the Applicant from receiving permanent total disability benefits, based on the Utah Code Annotated section 35-1-67 requirement that the Applicant show that industrial impairment prevented the Applicant from performing his former work.

We agree with the arguments set forth by the defendants and the Second Injury Fund. The Marshall case involves a factual setting that is different than the facts here involved. In the Marshall case, the Applicant was unable to return to work after his industrial accident. Here, the Applicant obviously was able to return to work because in fact he did. The Applicant worked for nearly one full year after his final industrial accident, and retired one day after he turned sixty-five years old. The facts in this case do not show that the Applicant has met his burden in showing inability to return to work as is required by Utah Code Annotated section 35-1-69. And

because this case is factually dissimilar to the Marshall case, an award of permanent total disability benefits to the instant Applicant is not "mandated" by the holding in that case. Therefore, we reverse the Administrative Law Judge's Orders of February 28, 1985 and March 26, 1985 and award instead, permanent partial impairment benefits.

As we read the medical panel report, there were only two ratable impairments as the result of the two industrial injuries on September 12, 1980 and December 29, 1982. The November 16, 1982 foot impairment did not result in permanent impairment. The impairments pre-existing before September 12, 1980 were as follows:

	WHOLE BODY IMPAIRMENT
Right ankle	7%
Hearing	5%
Cervical	5%
Left wrist	2%
Left knee	2%
Right arm	1%

Total Combined Pre-Existing Impairment

= 21%

Cervical degeneration occurring after the September 12, 1980 incident, and before the final industrial accident on December 29,1982, amounted to 2.5% or an additional 3% causing the combined total pre-existing impairment, at the time of the December 29, 1980 accident, to be 24% of the whole body. The industrial impairments at issue in this case are only two.

Right knee	9/12/80	2%	
Back	12/29/82	10%	Combined total of 12%

Using the Hair computation, the 12% represented above computes to a total of 9% of the whole body, due to the pre-existing impairments. The total impairment computes to 33% of the whole body (24% + 9%).

We agree with the Administrative Law Judge's finding that the defendants must pay 16 weeks of total temporary disability at the maximum rate of $284.00 a week amounting to $4,544.00. This amount is subject to a 24/33 reimbursement by the Second Injury Fund which is equal to 73% of $4,544.00 or $3,317.12. The permanent partial impairment the defendants must pay is 1.6% of 312 weeks or 4.9 weeks at $153.00 per week ($749.70) for the 1980 accident plus 7.4% of 312 weeks or 23 weeks at $189.00 per week ($4,347.00) for the 1982 accident totaling of $5,096.70. The permanent partial impairment the Second Injury Fund must pay is 21% of 312 weeks, or 65.5 weeks, at $153.00 per week ($10,021.50) for the pre-existing conditions as of September 12, 1980, and 3% of 312 weeks or 9.3 weeks, at $189.00 per week ($1,757.70) for the

cervical degeneration pre-existing the December 29, 1982 accident only, totaling $11,779.20. All amounts due are accrued and are to be paid as lump sums. The attorney's fees payable to Roger D. Sandack are in the amount of $3,962.68.

ORDER:

IT IS THEREFORE ORDERED that the Administrative Law Judge's Orders of February 28, 1985 and March 26, 1985 are hereby reversed.

IT IS FURTHER ORDERED that the defendant pay Applicant at the rate of $284.00 per week for 16 weeks or a total of $4,544.00 as compensation for temporary total disability less benefits paid heretofore.

IT IS FURTHER ORDERED that the defendant pay Applicant compensation at the rate of $153.00 per week for 4.9 weeks or a total of $749.70 as compensation for 1.6% permanent partial impairment, and at the rate of $189.00 per week for 23 weeks or a total of $4,347.00 for 7.4% permanent partial impairment, for a combined total of $5,096.70 which sum is accrued and payable in a lump sum.

IT IS FURTHER ORDERED that defendants pay all medical expenses incurred as the result of this accident; said expenses to be paid in accordance with the Medical and Surgical Fee Schedule of this Commission.

IT IS FURTHER ORDERED that the defendant pay Roger D. Sandack, attorney for the Applicant, the sum of $3,962.68, to be deducted from the award specified above.

IT IS FURTHER ORDERED that the Administrator of the Second Injury Fund prepare the necessary vouchers directing the State Treasurer as Custodian of the Second Injury Fund to reimburse the defendant to the extend of 73% of the amounts expended herein for temporary total disability, and medical expenses, upon the filing of a duly verified petition certifying the amounts expended.

IT IS FURTHER ORDERED that the Administrator of the Second Injury Fund prepare the necessary vouchers directing the State Treasurer, as Custodian of the Second Injury Fund, to pay to the Applicant at the rate of $153.00 per week for 65.5 weeks, or a total of $10,021.50, as compensation for pre-exisiting impairment consisting of 21% of the whole person, and at the rate of $189.00 per week for 9.3 weeks, or a total of $1,757.70, for pre-existing impairment consisting of 3% of the whole person, for a combined total of $11,779.20 which sum is accrued and payable in a lump sum.

IT IS FURTHER ORDERED that any Motion for review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof specifying in detail the particular errors and objections, and unless so filed this Order shall be final and not subject to review or appeal.

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 30th day of August, 1985

ATTEST:

Linda J. Strasburg
Commission Secretary

Stephen M. Hadley
Chairman

Walter T. Axelgard
Commissioner

Lenice L. Nielsen
Commissioner

CERTIFICATE OF MAILING

I certify that on August 30, 1985 a copy of the attached Granting of Motion for Review was mailed to the following persons at the following addresses, postage paid:

Roger D. Sandack, Attorney, 500 Kearns Bldg., 136 South Main, Salt Lake City, Utah 84101

Robert Finch, Attorney, 559 East South Temple, Salt Lake City, Utah 84102

Erie Boorman, Administrator, Second Injury Fund

Alma E. Peck, 56 West Sunset Avenue, Salt Lake City, Utah 84115

INDUSTRIAL COMMISSION OF UTAH

By Barbara

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 83000275

ALMA E. PECK,

Applicant,

vs.

EIMCO PROCESS EQUIPMENT COMPANY,

Defendant.

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

HEARINGS: 1) Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on October 17, 1983, at 8:30 o'clock a.m.

2) Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah on September 25, 1984, at 8:30 o'clock a.m.

Said hearings were pursuant to Order and Notice of the Commission.

BEFORE: Keith E. Sohm, Administrative Law Judge.

APPEARANCES: The Applicant was present and represented by Roger D. Sandack, Attorney at Law.

The Defendant was represented by Robert R. Finch, Attorney at Law.

FINDINGS OF FACT:

The Applicant is claiming benefits for three separate incidents, each of which he claims occurred during the course of his employment.

On September 12, 1980, the Applicant was crawling on a cement floor and his right knee locked up. He was examined by Dr. Beck and surgery was performed October 7, 1980. The Applicant had a similar operation on the left knee back in the 1970's. On November 16, 1982, the Applicant was attempting to loosen a pipe joint and was standing on a wrench when the pipe broke allowing his right foot to come down hard causing immediate pain for which he was taken to the emergency hospital. Medical benefits and temporary total disability compensation were paid. The Applicant indicates that he still has

some problem with the right foot and tends to walk more on the toe rather than on the ball of the foot.

On December 29, 1982, the Applicant and an associate employee were installing two eleven-foot sections of metal ladder. The lower section was installed and in order to install the next section an employee was up above pulling the ladder up by rope and the Applicant was walking up the lower ladder lifting the new section with his arms. The upper end of the ladder caught on something and the Applicant was jerking on the lower part of the ladder with his right arm attempting to pull it out and away from whatever was blocking it. As he was pulling with his right arm he felt a pain in his lower back radiating into his hips. He told his partner to tie off the ladder because he had hurt his back and then went immediately to report the incident to his supervisor and ask for an additional man to complete the job. The Applicant rested over the holiday, attempted to go back to work but found it necessary to go to the company doctor January 11, 1983, who diagnosed his problem as muscle spasms and prescribed medication and therapy with Robert Greene and x-rays were taken at the Holy Cross Hospital. He was continued on the job. While he was still taking therapy he was attempting to hook some heavy cables onto a crane and felt additional intense pain. His back gave him constant pain from that time on. Dr. Slawson recommended further examination by Dr. Charles Rich who on February 21, took a CAT scan followed by a myelogram and then surgery was performed March 17, 1983, with the Applicant returning back to work June 27, 1983. No specific restrictions were imposed but the treating physician instructed the Applicant and his employer that he should be cautious with his back and not strain it. The Applicant indicated that he had to be careful and continued to have some pain in his back and in his right leg.

By way of history the Applicant had some ear infection problems in the right ear but claimed no disability. Sometime in 1960 he injured his right elbow resulting in several operations. In the 1950's or '60's the Applicant crushed his right ankle with a posthole digger which required considerable treatment. Back in about 1940 the Applicant had a horse fall with him hurting his back for which he visited a chiropractor but had no other medical treatment and lost no time from work. In 1970 the Applicant injured his left knee while working for Ajax Press on which Dr. Kezerian performed surgery. The Applicant also claimed some bronchial problems which give him some difficulty if he is exposed to dust or smoke.

The medical aspects of the case were referred to a Medical Panel for evaluation. The Medical Panel returned its Report copies of which were provided to the various parties. The Applicant filed an objection to the Report only to preserve his claim for a finding of permanent and total disability. A hearing was held on the objections. The Medical Panel Report was received in evidence and the Administrative Law Judge adopts the findings of the Panel as his own which are as follows:

"(1) Applicant's physical impairment as a result of all causes and conditions is as follows:

				Body
1.	Left knee	5% lower ext.	Old industrial 1970	2%
2.	Right knee	5% lower ext.	Industrial 9-12-80	2%
3.	Right foot	0%	Insufficient to rate 11-16-82	0%
4.	Right ankle	25%	Old injury & cause of foot pain	7%
5.	Back	10%	Due to 12-29-82	10%
6,	Right upper ext	2%	Old problem shoulder-elbow	1%
7.	Cervical	10%	Non-industrial degeneration	10%
8.	Left wrist	5%	Old fracture	2%
9.	Left hand	0%	Insufficient to rate	0%
10.	Right hand	0%	Insufficient to rate	0%
11.	Bronchial problems	0% (respiratory, consultation by Dr. Noehren)		
12.	Hiatus hernia	0% (not further investigated-insufficient to rate)		
13.	Hearing loss	32% right (audiology evaluation by Rex Scott, M.S.)	Binaural impairment	5.33%

Physical impairment as a result of all causes and conditions is combined to 33% permanent loss of body function.

"(2) Applicant's permanent physical impairment attributable to industrial injuries listed is as follows:

a. 9-12-80 Right knee 5% of lower extremity or 2% of body.

b. 11-16-82 Right foot insufficient to rate, recurrent foot pain is a result of limitation of motion of the ankle from old accident. 0%

c. 12-19-82 back 10% loss of body function.

Combined values of a. and c. 12% permanent loss of body function.

"(3) Pre-existing permanent physical impairment is listed as follows, whether due to accidental injury, disease or congenital causes.

			body
a.	Prior to the date of 9-12-80		
(1)	Left knee 5% lower ext.		2%
(4)	Right ankle	25%	7%

(6)	Right upper ext.	2%		1%
(7)	Cervical	5%		5%
(8)	Left wrist	5% hand		2%
(13)	Hearing loss	32% right	Binaural	5.33%

Combined values equals 20% loss of body function.

b. Prior to the date of 11-16-82

(1)	Left knee	5% lower ext.	2%
(2)	Right knee	5% lower ext.	2%
(4)	Right ankle	25%	7%
(6)	Right arm	2%	1%
(7)	Cervical	7.5% (2.5 due to natural progression since 9-12-80)	7.5%
(8)	Left wrist	5%	2%
(13)	Hearing loss	32% right	5.3%

All impairment pre-existing 11-16-82 combines to 25% permanent physical impairment.

c. Permanent physical impairment pre-existing 12-29-82 is unchanged from b. inasmuch as no permanent impairment was assigned to the alleged foot injury of 11-16-82.

"There has been a 2.5% increase of the cervical spine due to natural progression between 9-12-80 and 12-29-82. There has been a further 2.5% increase in the cervical spine due to natural causes from 12-29-84 to the present. These are included above in their proper places."

The overall combined impairment is 33%, 12% of which is related to industrial causes. Though the Panel indicates pre-existing was 25% we note that part of that included an industrial injury from 1980 and therefore we are treating the pre-existing as 21%. The Applicant requested a finding of permanent and total disability pursuant to the standards set in the John Marshall v. Industrial Commission case of April 1984. The matter was referred to the rehabilitation counsellor who found that the Applicant, who is now sixty-five years old, together with his other deteriorating health conditions was not a good candidate for rehabilitation.

With great reluctance the Administrative Law Judge finds that the Applicant is permanently and totally disabled under the present case holdings, and is entitled to benefits accordingly. We believe the Marshall case mandates such a finding but we do believe the finding in that case is in error. Workmen's compensation benefits should not be confused with retirement benefits and should not be brought into a retirement situation either to be a substitute for or a supplement to retirement. In this case the Applicant was last injured December 29, 1982. After treatment and surgeries he returned to work June 27, 1983, and worked up to his sixty-fifth birthday on April 22, 1984, and voluntarily terminated on April 28, 1984.

The Applicant worked effectively before the December 1982 injury despite his 27% pre-existing impairment which included such things as hearing loss. The December 1982 incident only added a 10% impairment. The Applicant was able to work effectively in his job for about a year after his injuries healed. There is no evidence of a new injury, nor is there any medical evidence that the Applicant was taken off the job April 28, 1984, because of his old injuries. The Applicant just plain retired. He will now draw retirement benefits, Social Security and $241.00 per week for a comfortable rest of his life. By this reasoning many workers nearing retirement with previous injuries are also entitled to a nice comfor- table workmen's compensation retirement program.

There is no issue of temporary total disability compensation. However, it must be noted that the Applicant received temporary total disability benefits following his December 1982 accident for the period from March 7, 1983, to June 27, 1983, at 16 weeks x $284.00 = $4,544.00. The Applicant was earning a sufficient income to entitle him to the maximum benefit for permanent and total disability of $241.00 per week for 312 weeks which would result in a total entitlement of $75,192.00. The Defendant should pay 12/33 or 36% of that amount which would equal 112.32 weeks less 16 weeks paid in temporary total disability benefits for a balance of 96.32 weeks, which when multiplied times $241.00 would equal $23,213.12. Payment should be made in a lump sum as accumulated from April 28, 1984, to February 22, 1985, a period of 43 weeks which when multiplied times $241.00 would equal $10,363.00 to be paid in a lump sum. The balance is to be paid at the rate of $241.00 per week until the balance is paid somewhere near June 22, 1986. Thereafter, the Second Injury Fund would commence payment on the balance due computed at the rate of 64% of 312 weeks or 199.68 weeks which when multiplied times $241.00 would equal $48,122.88 payment of which would commence at the expira- tion of payments by the Defendant Company on or about March 1, 1986, and continued until paid in full. After the conclusion of the 312 weeks the Applicant is entitled to continued benefits at the rate of $241.00 per week from the Second Injury Fund unless otherwise ordered by the Commission.

Applicant's attorney is entitled to attorney's fees based on $75,192.00 less $4,544.00 already paid in temporary total disability benefits or $70,648.00 in accordance with the Commission's formula, which would equal $10,065.00. We further note Ronald C. Barker performed legal services for Applicant and may be entitled to a portion of attorney's fees awarded if not already paid for his services.

CONCLUSIONS OF LAW:

The Defendant Company and the Second Injury Fund should pay the sums set forth above.

ORDER:

IT IS HEREBY ORDERED that the Defendant Company pay the Applicant $23,213.12 with $10,363.00 to be paid in a lump sum and the balance payable at the rate of $241.00 per week commencing on or about February 22, 1985, until about March 1, 1986.

IT IS FURTHER ORDERED that the State Treasurer, as Custodian of the Second Injury Fund, pay the Applicant compensation based on 64% permanent total impairment at the rate of $241.00 per week for 199.68 weeks in the amount of $48,122.88 commencing with said weekly payment on or about June 22, 1986, when payments from the Defendant Company terminate.

IT IS FURTHER ORDERED that the Defendant pay all medical expenses incurred as the result of this accident, in accordance with the Medical and Surgical Fee Schedule of this Commission.

IT IS FURTHER ORDERED that Roger D. Sandack, Attorney for the Applicant, be paid the sum of $10,065.00, the same to be deducted from the aforesaid award.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof specifying in detail the particular errors and objections, and unless so filed this Order shall be final and not subject to review or appeal.

Keith E. Sohm
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
28th day of February, 1985.

ATTEST:

/s/ Linda J. Strasburg

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on the 28th day of February, 1985, a copy of the attached Findings of Fact, Conclusions of Law, and Order was mailed to the following persons at the following addresses, postage paid:

Eimco Process Equipment Company
Attention: E.W. Chapman
P.O. Box 300
Salt Lake City, UT 84110

Robert R. Finch, Attorney at Law
559 East South Temple
Salt Lake City, UT 84102

Gilbert A. Martinez, Administrator
Second Injury Fund

Alma E. Peck
56 West Sunset Avenue
Salt Lake City, UT 84115

Roger D. Sandack, Attorney at Law
500 Kearns Building
136 South Main
Salt Lake City, UT 84101

THE INDUSTRIAL COMMISSION OF UTAH

By DeAnn

IN THE SUPREME COURT

OF THE STATE OF UTAH

ALMA E. PECK, Petitioner, vs. EIMCO PROCESS EQUIPMENT CO. SECOND INJURY FUND and INDUSTRIAL COMMISSION OF UTAH, Respondents.	)	PETITION FOR WRIT OF REVIEW Case No. 20914

TO THE SUPREME COURT OF THE STATE OF UTAH:

Petitioner Alma E. Peck, by and through his attorney of record, Roger D. Sandack, hereby petitions this honorable Court pursuant to Utah Code Ann. § 35-1-83 to review a Final Order of the Industrial Commission of Utah granting a Motion for Review filed by respondents, on the grounds and for the reasons that the Industrial Commission acted in excess of its powers, arbitrarily and capriciously and without substantial evidence and in violation of law in modifying a Final Order by an Administrative Law Judge of the Industrial Commission, dated March 26, 1985, by denying permanent total disability to petitioner, Alma E. Peck.

Petitioner alleges in support hereof as follows:

1. That on or about February 28, 1985, an Administrative Law Judge of the Industrial Commission issued an Order, supplemented on March 26, 1985, which ordered defendants

to pay to petitioner permanent total disability benefits based upon findings by the Administrative Law Judge that the petitioner was permanently totally disabled, and accordingly entitled to the benefits under Utah's workmen's compensation laws.

2. Respondents filed a Motion to Review the Administrative Law Judge's finding, which motion was granted by Order dated August 30, 1985. The Industrial Commission's Order granting respondents' Motion to Review is not supported by fact or law. More specifically, the Industrial Commission found that the petitioner had been able to return to work after the industrial injury. The Industrial Commission completely ignored the findings of the Administrative Law Judge, the full and complete testimony of the petitioner that he was unable to perform his work and was allowed to continue only with the charity of fellow workers, and in fact was forced to retire by Eimco Corporation. As found by the report of the rehabilitation counselor of the Utah State Office of Education, the petitioner was not a good candidate for rehabilitation and in fact was permanently totally disabled.

3. Petitioner has not received any payment for the industrial injury which was sustained, as found not only by the Administrative Law Judge but also by the Industrial Commission. This matter should be placed upon an accelerated appeals calendar and the petitioner hereby requests an order specifically enforcing the weekly payment provisions as ordered by the Industrial Commission, pending appeal herein.

WHEREFORE, petitioner requests a Writ of Review be issued from this Court for the purpose of inquiring into the lawfulness of the Industrial Commission's order and reviewing the orders of the Industrial Commission and awarding petitioner the permanent total benefits entitled to him at the appropriate compensation rate, as provided by law, together with such other and further relief as the Court may deem just and equitable.

DATED this 27th day of September, 1985.

GIAUQUE & WILLIAMS
500 Kearns Building
Salt Lake City, UT 84101
Telephone: 801/533-8383

By _____
Roger D. Sandack
Attorney for Petitioner

2484L

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that copies of the foregoing PETITION FOR WRIT OF REVIEW were placed in the United States mail, postage prepaid, to the following persons on this 17th day of [illegible], 1985:

Office of the Attorney General
State Capitol Building
Salt Lake City, UT 84114

Robert Finch, Esq.
559 East South Temple
Salt Lake City, UT 84102

Erie Boorman, Administrator
Second Injury Fund
160 East 300 South
Salt Lake City, UT 84111